

August 22, 2006

Mary Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station, 2nd floor  
Boston, MA 02110

Re: **NSTAR Gas Company, D.T.E. 06-44**

Dear Ms. Cottrell:

On May 5, 2006, NSTAR Gas Company (“NSTAR” or “Company”) filed a petition with the Department of Telecommunications and Energy (“Department”) for approval of a long-term agreement (“Proposed Agreement”) with Northeast Energy Associates, Limited Partnership (“NEA”) for purchase of winter service gas supply and transportation capacity. The Attorney General intervened on June 9, 2006 and the Department held an evidentiary hearing on August 10, 2006. Pursuant to the Department’s Procedural Schedule, the Attorney General submits this letter as his Initial Brief.

## **I. Standard of Review**

In evaluating a gas utility's acquisition of commodity resources and the acquisition of capacity under G.L. c. 164, § 94A, the Department examines whether the acquisition of the resource is consistent with the public interest. *Bay State Gas Company*, D.T.E. 98-79 at 1 (1998), *Commonwealth Gas Company*, D.P.U. 94-174-A at 27 (1996).

## **II. NSTAR’s Proposal**

The terms of the Proposed Agreement provide that NSTAR will purchase gas during the months of April to October for injection into storage, and that it will have the opportunity to nominate up to 14,000 Dekatherms (“Dth”) per day from November through March to serve its Framingham Division until March 31, 2012. Exh. MAG-1 at 5, lines 11-18, at 7, lines 3-22. The Proposed Agreement contains the following terms:

- A. NEA may unilaterally elect to assign upstream capacity and storage resources to NSTAR;<sup>1</sup>
- B. This assignment would also cause early termination of the Proposed Agreement;<sup>2</sup> and,
- C. If NSTAR fails to use all the gas in storage by the termination date, NEA would purchase that unused gas back at a discounted price.<sup>3</sup>

### III. The Department May Not Allow The Recovery of Termination Costs

If NSTAR fails to use all the gas in storage by the termination date, NEA would purchase that unused gas at a discounted price. Tr. at 64, lines 19-24, at 65, lines 1-24. In effect, NSTAR would incur a penalty if the Company fails to use all of the natural gas by the termination date. *Id.* The Company has stated that it would seek reimbursement for that penalty from customers in a cost of gas (“CGA”) proceeding,<sup>4</sup> even though the Company admitted that its own “silly” decisions would cause it to have leftover gas in storage at the termination of the contract and therefore incur termination costs. Tr. at 64, lines 19-24, at 65, lines 1-24. (“If [NSTAR] were silly enough not to nominate to withdraw the gas that [it] paid for,” then NSTAR would have unused gas that it would sell to NEA at a discounted price).

The Department may not allow recovery of costs that are imprudent.<sup>5</sup> The Company’s admission that its own imprudent actions would result in it incurring these costs, *see* Tr. at 64, lines 19-24, at 65, lines 1-24, establishes that their recovery is not just and reasonable and not in the public interest. G.L. c. 164, § 94. Moreover, NSTAR cannot recovery this cost from customers that amounts to a penalty that it would knowingly incur by its own imprudent actions.<sup>6</sup> *Key Span Energy Delivery New England*, D.T.E. 03-40, 258 (2003) (finding that Dig Safe and other fines and penalties should be directly assessed on the utility whose actions give rise to the fine or penalty, not an affiliate utility); *Boston Gas Company*, D.P.U. 88-67, Phase I at 143 (1988) (denying cost recovery of traffic fines because cost recovery by a utility that knowingly incurs a civil fine would contradict sound public policy); *Kings Grant Water Company*, D.P.U. 87-228 at 19 (1988) (denying cost recovery when a company knowingly incurred legal fines for illegal operation of a van on public ways). Therefore, the Department should put the Company on notice, that should it incur any penalties under the Proposed Agreement, that they are not recoverable from customers.

<sup>1</sup> Upstream capacity is defined as capacity on Texas Eastern Transmission Company’s Pipeline and Upstream Storage refers to Dominion Transmission, Inc. Tr. at 17, lines 13-15; Exh. MAG-1 at 7, lines 12-22.

<sup>2</sup> Evidentiary Hearing Transcript (“Tr.”) at 7, lines 2-8.

<sup>3</sup> Tr. at 64, lines 19-24, at 65, lines 1-24.

<sup>4</sup> *Id.*

<sup>5</sup> For costs a company seeks to recover in rates, the expenditures must be prudently incurred, and the resulting plant must be used and useful in providing service to ratepayers. *Fitchburg Gas & Electric Light Company*, D.T.E. 98-51, at 12 (1998), *Boston Gas Company*, D.P.U. 93-60, at 24 (1993).

<sup>6</sup> Though the Company wavered on whether this is a penalty, Tr. at 64, lines 19-24; at 65, lines 1-20, it is a penalty because, like the cases cited above, it is a cost that the Company incurs as a result of its own error to nominate all gas prior to the termination of the proposed agreement, if adopted.

### **III. CONCLUSION**

The Department should adopt the recommendations made by the Attorney General in the best interests of consumers.

Respectfully submitted,

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ATTORNEY GENERAL

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cc: Service List